

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARSHA CLINE

Claimant

VS.

EATON CORPORATION

Respondent,
Self-Insured

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Docket No. 262,170

ORDER

Claimant appealed the July 26, 2002 Award entered by Administrative Law Judge Bruce E. Moore. The Appeals Board heard oral argument on March 21, 2003, in Wichita, Kansas.

APPEARANCES

Scott J. Mann of Hutchinson, Kansas, appeared for claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

The parties agreed that on July 17, 1997, claimant injured her right hand, wrist and fingers when she caught her hand in a chucker machine. But claimant also contends that while continuing to work after the July 17, 1997 injury she injured her left thumb and hand due to compensating for the right hand injury. Accordingly, claimant alleges repetitive use injuries to her upper extremities occurring through March 10, 1999. Claimant also alleges that she sustained permanent impairment to her right hip as the result of surgery to remove bone from the hip that was used in the right wrist.

In the July 26, 2002 Award, Judge Moore determined claimant sustained a scheduled injury to her right upper extremity and, consequently, granted claimant benefits for a 34 percent permanent partial loss to the right forearm. The Judge rejected claimant's

argument that she had sustained permanent injury or permanent impairment to either her left thumb or hip.

Claimant contends Judge Moore erred by failing to grant her permanent partial general disability benefits under K.S.A. 1997 Supp. 44-510e. With the testimony from Drs. Philip R. Mills and C. Reiff Brown, claimant argues that she has established permanent impairment to her right hip. Additionally, claimant argues that she has proven that she has either permanently injured the left thumb or permanently aggravated the arthritis in her left thumb by compensating for her right upper extremity injuries.

Claimant requests a 23 percent permanent partial general disability for the period up through November 2, 2001, when she was laid off, followed by a 62.63 percent work disability (a permanent partial general disability greater than the functional impairment rating) until April 15, 2002, when she returned to work for respondent.

Conversely, respondent argues claimant should receive benefits for a scheduled injury to the right upper extremity under K.S.A. 1997 Supp. 44-510d. In the alternative, respondent argues claimant has a 6.25 percent task loss and a 44 percent wage loss for a 25 percent work disability should the Board determine claimant has sustained a work disability.

The only issue before the Board on this appeal is the nature and extent of claimant's injuries and disability.

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. On July 17, 1997, claimant injured her right upper extremity when she caught her hand in a machine. The accident crushed and shattered the bones in claimant's right wrist, requiring a bone graft. Before her medical treatment ended, claimant underwent approximately six surgeries on her right wrist, hand and fingers, including a bone graft and fusion. Claimant incurred over \$69,000 in medical expenses.
2. Dr. Jay Stanley Jones, an orthopedic surgeon, treated claimant through July 27, 1998. The doctor first operated on claimant on August 27, 1997, when he attempted to repair the right wrist, utilizing bone harvested from the iliac crest of claimant's right hip. The harvest created a four to five inch scar extending downward from the beltline. On June 10, 1998, Dr. Jones performed a second surgery to remove wire from claimant's hand.
3. Respondent referred claimant to Dr. J. Mark Melhorn, who first saw claimant on August 27, 1998, and diagnosed right carpal tunnel syndrome secondary to

claimant's crush injury. Accordingly, on November 2, 1998, the doctor performed right carpal tunnel release surgery. On March 10, 1999, the doctor fused the right wrist. In July 1999 and again in November 1999, Dr. Melhorn operated on claimant's right middle finger to remove a recurrent ganglion. Eventually, on December 15, 1999, the doctor released claimant from his care.

4. Claimant is right hand dominant. But as claimant worked following the July 17, 1997 accident and her many surgeries, she increasingly used her left hand to perform her work duties. Moreover, after her March 1999 right wrist fusion, claimant performed her work using her left hand only. Consequently, claimant developed left thumb symptoms, which she attributed to loading and unloading the machines at work. Claimant mentioned the left thumb symptoms to Dr. Melhorn and his records contain pain drawings dated August 19, 1999, and September 15, 1999, which show symptoms involving the left thumb and hand. When Dr. Melhorn released claimant from treatment in December 1999, she was still experiencing pain in a joint at the base of her left thumb.
5. Despite her injuries, claimant continued to work for respondent through November 2, 2001, when she was laid off. At the time of the layoff, claimant was working as a punch grinder. Claimant could not transfer to respondent's paint line due to her work restrictions. The parties stipulated that when claimant was laid off she sustained a 44 percent wage loss.
6. But on April 15, 2002, claimant returned to work for respondent. The parties stipulated that when claimant returned to work following the layoff she earned a wage that was comparable to the wage that she was earning at the time of the July 1997 accident. Consequently, for the period commencing April 15, 2002, claimant has no wage loss.
7. The record contains the opinions from three doctors regarding the extent of claimant's injuries. Using the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (4th ed.), Dr. Melhorn rated claimant as having a 30 percent permanent functional impairment to the right upper extremity at the level of the forearm. The doctor was unable to rate the hip or the bone graft donor site. The doctor stated:

Based on the clinical examination during the time that I saw the patient, her lack of subjective complaints with regard to the hip, the lack of White drawings demonstrating any symptoms with regard to the hip, I would be unable to provide an impairment with regard to the hip or iliac graft crest [sic] site.¹

¹ Melhorn Depo. at 10.

On cross-examination, however, the doctor admitted that he did not examine the bone graft donor site. The doctor also acknowledged that he had rated other individuals for permanent impairment at a bone graft donor site using the AMA *Guides* due to scar tissue, decreased range of motion, additional bone formation and pain. The doctor stated:

If you want me to examine her and see if the objective findings and the subjective complaints match and if I feel they do and I believe they deserve to be rated, I will be happy to do that. But based on the criteria that I have presently and the materials that I have present, I would not rate that at this time.²

Likewise, because of lack of complaints regarding the left thumb and hand and based upon the clinical examination, Dr. Melhorn was “unable to provide an impairment with regard to the left [upper extremity].”³

8. Orthopedic surgeon Dr. C. Reiff Brown evaluated claimant at her attorney’s request. Dr. Brown examined claimant in February 2001 and rated claimant as having a 39 percent impairment to the right upper extremity. The doctor also diagnosed degenerative arthritis in the left thumb, which the doctor believed had been aggravated by protecting the right upper extremity and which the doctor rated as comprising a one percent impairment to the left upper extremity. Moreover, Dr. Brown also determined that claimant had sustained a one percent whole person functional impairment for the bone graft donor site. The doctor explained his rating for the bone graft donor site, as follows:

She had bone loss there. Bone was removed from the anterior superior iliac spine for the bone graft which results in an area of scarring of the underlying muscle which has to be stripped away from the bone before it’s taken out. That leaves a surgical scar, it leaves an area of scar tissue formation adjacent to the bone that was stripped and removed. Those areas, in my opinion, such an area is worth one percent whole body impairment. I think there’s a table in the *Guides* that would support that rating based on disorders of the skin.⁴

² *Id.* at 26.

³ *Id.* at 14.

⁴ Brown Depo. (Aug. 16, 2001) at 9-10.

Combining the impairments to the right upper extremity, the left thumb and hip, Dr. Brown determined that claimant sustained a 25 percent whole person functional impairment according to the *AMA Guides*.

9. The Judge requested Dr. Philip R. Mills, who is board-certified in physical medicine and rehabilitation, to evaluate claimant for purposes of this claim. The doctor examined claimant in April 2001 and determined claimant had a 34 or 35 percent functional impairment to the right upper extremity under the *AMA Guides* (4th ed.). The doctor did not initially believe the bone graft donor site at the hip constituted an impairment under the *Guides*. But the doctor later testified that if claimant's regular hearing testimony about having sensitivity at the scar site was true then the *Guides* would measure the impairment at the hip at one percent to the whole person.
10. Dr. Mills also diagnosed claimant as having left thumb basal joint arthrosis. But because the condition is multifactorial, the doctor could not attribute the cause of the arthrosis to overuse from protecting the right hand. But the doctor, on the other hand, did believe that repetitive use would have aggravated the thumb condition. The doctor testified, in part:

Basal joint arthrosis [*sic*] is generally multifactorial. Certainly, multiple use and other [*sic*] use is one of the possibilities that would have to be considered, and based on that, I could certainly say that would be a possibility.

But even so, within a reasonable degree of medical probability, given the commonness of the problem and the multifactorial nature of the problem, I couldn't say within a reasonable degree of medical probability that it was causally related, though. Certainly it might be.

. . . .

That it [claimant's work activities] probably would have, more probably than not, would have aggravated an underlying arthrosis [*sic*].⁵

Nonetheless, Dr. Mills did not believe that claimant had sustained a permanent impairment to the left upper extremity as he thought the aggravation to claimant's left thumb was only temporary.

⁵ Mills Depo. at 9-10.

11. According to Dr. Mills and using the *AMA Guides*, if one combined the 34 percent functional impairment to the right upper extremity with a one percent whole person functional impairment for the hip, the result is a 21 percent whole person functional impairment. Furthermore, according to the doctor, if the left thumb constituted a permanent impairment the *Guides* would rate claimant as having a 22.6 percent whole person functional impairment for all three injuries.
12. Both Drs. Brown and Mills reviewed a list of the work tasks that claimant performed in the 15 years before the July 1997 accident. That list itemizes 32 work tasks, some of which are noted to be duplicates. When eliminating the duplicate tasks, the Board finds that Dr. Brown determined that claimant should no longer perform approximately 19 of the 25 (76 percent) former tasks due to her work-related injuries. Conversely, the Board finds that Dr. Mills determined that claimant has lost the ability to perform approximately one of the 25 (four percent) former work tasks. Although it is somewhat conjectural which tasks are duplicates, the Board has reviewed the task list and has used the most conservative percentages as it is claimant's burden to prove her task loss. The Board believes claimant's task loss falls somewhere between Dr. Brown's 76 percent task loss opinion and Dr. Mills' four percent task loss opinion. Averaging those percentages, the Board finds that claimant has lost the ability to perform 40 percent of her former work tasks.

CONCLUSIONS OF LAW

The July 26, 2002 Award should be modified to award claimant permanent partial general disability benefits under K.S.A. 1997 Supp. 44-510e.

The Board concludes the greater weight of the evidence indicates that as a direct result of the crush injury to claimant's right hand, claimant has also sustained a permanent injury or permanent aggravation to her left thumb and permanent impairment to the bone graft donor site in her right hip.

Because claimant's injuries comprise an "unscheduled" injury, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 1997 Supp. 44-510e, which provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning

after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. **Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.** An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

Following the accident through the date of her layoff on November 2, 2001, claimant's permanent partial general disability is based upon her whole person functional impairment rating as claimant was continuing to work for respondent at a comparable wage. Averaging the whole person functional impairment ratings provided by Drs. Brown (25 percent) and Mills (22.6 percent), the Board finds claimant has a 24 percent permanent partial general disability through November 2, 2001.

For the period that claimant was laid off from November 3, 2001, through April 14, 2002, claimant has a 42 percent permanent partial general disability. The parties stipulated that claimant's wage loss during that period was 44 percent. Averaging the 44 percent wage loss with the 40 percent task loss creates a 42 percent work disability.

When claimant returned to work on April 15, 2002, she once again began earning a wage comparable to the wage that she was earning on the date of accident. Consequently, as of April 15, 2002, claimant's permanent partial general disability decreases to 24 percent.

AWARD

WHEREFORE, the Board modifies the July 26, 2002 Award, as follows:

Marsha Cline is granted compensation from Eaton Corporation for a July 17, 1997 accident and resulting disability. Based upon an average weekly wage of \$554.84, Ms. Cline is entitled to receive 42.43⁶ weeks of temporary total disability benefits at \$351 per week, or \$14,892.93.

For the period ending November 2, 2001, Ms. Cline is entitled to receive 93.02 weeks of permanent partial general disability benefits at \$351 per week, or \$32,650.02, for a 24 percent permanent partial general disability.

⁶ See R.H. Trans. at 7.

For the period from November 3, 2001, through April 14, 2002, Ms. Cline is entitled to receive 23.29 weeks of permanent partial general disability benefits at \$351 per week, or \$8,174.79, for a 42 percent permanent partial general disability.

Beginning April 15, 2002, Ms. Cline's permanent partial general disability decreases to the 24 percent whole person functional impairment rating, leaving no additional permanent disability benefits due and owing due to the accelerated payout provisions of the Workers Compensation Act.⁷

Accordingly, Ms. Cline is entitled to a total award of \$55,717.74, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Director, Division of Workers Compensation

⁷ See *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).